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No. 90-727

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ROBERT G. HOLMES, JR.,
Petitioner,

VS.

SECURITIES INVESTOR PROTECTION CORPORATION, EUGENE W. BELL, Trustee for the Liquidation of Joseph Sebag Incorporated, and LAURENCE A. SCHROEDER, Successor Trustee for the Liquidation of First State Securities Corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF IN REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Robert G. Holmes, Jr. ("Holmes" or "Petitioner") hereby respectfully submits the following reply to the Respondents' brief in opposition to his petition for a writ of certiorari to the United States Court of Appeal for the Ninth Circuit.

ARGUMENT

A. The Court Should Grant A Writ of Certiorari To Review The Application Of The Purchaser/Seller Rule In RICO Suits Where The Alleged Predicate Acts Are Violations Of Rule 10b-5 Because The Decisions of The Circuits Which Have Addressed The Issue Are In Conflict, Are Not Reconcilable, And The Conflicting Opinions Are Already Sufficiently Illumined

In opposition to the petition for a writ of certiorari, Respondents suggest that the conflict which exists among the decisions of the Ninth and Eleventh Circuits, on the one hand, and the Fourth and Eighth Circuits, on the other hand, with respect to the application of the purchaser/seller rule in RICO suits, is not yet "ripe" for review. Essentially, Respondents urge the Court not to review the Ninth Circuit's decision below, even though there is an admitted conflict among the circuits, because there are other circuits which have not yet addressed the application of the purchaser/seller rule in the RICO context.

The non-existence of other circuits' decisions, however, should not preclude the Court's review of this issue at this time. The conflict which exists among the four circuits which have addressed the purchaser/seller issue in the context of RICO is concrete. While Respondents argue that the conflict should "become irreconcilable" before review, they do not suggest that the decisions of the Ninth and Eleventh Circuits are reconcilable with those of the Fourth and Eighth Circuits.

Respondents hint that review is also not appropriate at this time because the issue of the purchaser/seller rule's application in RICO actions needs further study. (Opposition Brief at 10.) Respondents do not say in what respects further study is required. In fact, the raison d'etre of the purchaser/seller rule of standing in securities fraud actions brought under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act") is well established and has been articulated over forty years of federal securities law jurisprudence.[1] Under the purchaser/seller rule, only the actual purchasers or sellers of securities can sue for fraud damages. If the Ninth and Eleventh Circuits' position that the purchaser/seller rule does not apply in RICO actions predicated on Section 10(b) and Rule 10b-5 violations ultimately prevails, the purchaser/seller rule would cease to be an effective limit on the right of certain plaintiffs to sue for damages on claims essentially based on Section 10(b) and Rule 10b-5 violations.

The reasons which spawned the purchaser/seller rule, however, remain intact. The purchaser/seller rule originated to limit the plaintiff class in Section 10(b) and Rule 10b-5 private damages actions to actual purchasers or sellers of securities because Congress did not provide an express private right of action for alleged violations of Section 10(b) and Rule 10b-5. Instead, the courts developed an implied right of action.[2] The reason for limiting the plaintiff class to actual purchasers and sellers of securities is that Section 10(b) and Rule 10b-5 "proscribed only fraud in connection with the purchase or sale of securities, and ... the history of [Section] 10(b) revealed no congressional intention to extend a private civil

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[1] *See International Data Corp. v. Zepkin*, 812 F.2d 149, 152 (4th Cir. 1987) (RICO was enacted against a backdrop of forty years of federal securities laws).

[2] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975).

remedy for money damages to other than defrauded purchasers or sellers of securities. . . ."[3]

This Court has noted the policy considerations which support the purchaser-seller rule and has stated that the rule provides "countervailing advantages" to any disadvantages which arise from the rule's limitation on private suits.[4] Among these policy considerations are the vexatiousness of securities fraud litigation, the possibility of large judgments whose incidence would devolve on investors (and the public at large), the possibility of coercive settlements, the possibility of "strike" suits, the extensiveness of discovery in securities fraud actions, the difficulty of disposition of suit by summary proceedings and, ultimately, the disruption of normal business activity.[5]

Section 10(b) and Rule 10b-5, of course, have never been amended to provide for an express private remedy or to revoke the judicially developed limitations on suit. The question for this Court's consideration, therefore, which is raised in the instant petition for a writ of certiorari, is whether the fact that RICO provides an express remedy for its violation entitles a plaintiff, who *expressly* alleges violations of Section 10(b) and Rule 10b-5 as the "predicate acts" which caused his injury, to sue and recover treble damages under RICO, when the same plaintiff would have been barred if he or she had sought recovery under the Exchange Act. Petitioner's position is that if a plaintiff is allowed such recovery under RICO, then RICO would effectively eclipse the Section 10(b) and Rule 10b-5 bar and would, in effect, grant a right of action, by way of

[3]*Id.* at 731.

[4]*Id.* at 738-39.

[5]*Id.* at 739-743.

RICO, to otherwise barred plaintiffs to sue for Section 10(b) and Rule 10b-5 violations.[6]

To bolster their argument that there is not yet a deliberate conflict among the circuits, Respondents nebulously add that the positions of the Eleventh and Eighth Circuits "are at best cryptic." (Opposition Brief at 10.) Cryptic or not, the positions of the Eleventh and Eighth Circuits have precedential value and may be followed by other courts.[7] In fact, in the courts below, Respondents expressly relied upon the very Eleventh Circuit's decision which they now cast askance as "cryptic."

Too, the Ninth Circuit, in its decision below, cited the Eleventh Circuit's decision in analyzing the purchaser/seller rule under the provisions of RICO.[8] Therefore, contrary to Respondents' suggestion that "the basic arguments have [not] been fully made," the basic arguments have crystallized sufficiently for different courts to adopt different positions on the same legal issue, and for litigants, such as Petitioner and Respondents here, to cite

[6]The question presented deals exclusively with recovery under RICO for damages based upon alleged violations of Section 10(b) and Rule 10b-5 under the Exchange Act and not other provisions of the federal securities laws. The Court has stated in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), that the compensable injury under RICO is the harm from the *predicate acts* sufficiently constituted to form a "pattern" of racketeering. *Sedima*, 473 U.S. at 497. Thus, when the predicate acts are violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the plaintiff in effect seeks compensation under RICO for the defendant's violations of Section 10(b) and Rule 10b-5.

[7]*See* 20 Am. Jur. 2d *Courts* § 186 at 521 (1965) (courts do not lightly overrule a precedent) and 20 Am. Jur. 2d *Courts* § 190 at 526-27 (1965) ("courts have sometimes given dicta the same effect as holdings . . .").

[8]*SIPC v. Holmes*, 908 F.2d 1461, 1466 (9th Cir. 1990).

those conflicting positions in support of their respective cases. Respondents' argument that more circuits should rule on the issue before the issue is "ripe" for adjudication is unavailing because, taken to its logical conclusion, no issue would ever ripen as long as there are some circuits which have not yet spoken.

Respondents also disagree with Petitioner's suggestion that the Ninth Circuit's decision will tend to increase civil RICO litigation against legitimate businesses and that this might result in judgments against these businesses that will be punitive beyond the actual culpability of the businesses. Respondents cite to one of their counsel's statistical data collected in a law review article as evidence that Holmes' prediction of increased RICO litigation will not come to fruition. The data cited do not purport to address the increase in suits by plaintiffs who previously did not sue because of the real or imagined bar of the purchaser/seller rule. Moreover, regardless of the merits of the data, the removal of an impediment to standing would logically free an unknown number of potential plaintiffs to sue under RICO on suits barred by the purchaser/seller rule under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Moreover, it is precisely because RICO applies to both legitimate and illegitimate enterprises that it becomes imperative for this Court to review the Ninth Circuit's decision. Securities transactions affect a great majority of legitimate business enterprises. If in fact legitimate business enterprises find themselves deluged by a wave of fraud litigation by a new class of plaintiffs, the cost of response to such litigation, including judgments paid, will ultimately be borne by the society at large. By alleging that violative securities transactions occurred as a pattern of "predicate acts," plaintiffs could convert otherwise garden variety fraud claims into federal RICO claims for which treble damages might be recoverable at a societal cost out of step with any deterrent value to the alleged fraud.

It might be appealing to rejoin the foregoing arguments with the suggestion that non-purchasers or non-sellers of securities who are able to prove injury from securities fraud should be compensated under RICO, without impediment of standing limitations. RICO, however, is not merely compensatory, it is punitive. When RICO's punitive effect is directed toward legitimate business enterprises by plaintiffs who previously might not even have had a securities fraud claim against such business enterprises, the result will be to foster the very dangers against which *Blue Chip Stamps* sought to guard.

B. The Opposition Mis-States The Question Presented By Petitioner Holmes With Respect To Conspiracy Liability And Does Not Oppose Or Address The Question Actually Presented

Respondents' Opposition describes the question presented in the Petition in connection with the issues of causation and conspiracy as follows:

> "Petitioner contends that the circuit court's decision holding that a consiprator is liable for his co-conspirators' conduct ought to be reviewed by this Court." (Opposition Brief, page 17.)

In fact, this contention attributed to Petitioner entirely mis-states the question raised by Petitioner. The question actually presented for review relates to a condition precedent to a determination of a person's status as a conspirator, not the admitted and undisputed consequences which follow after a person is determined to be a conspirator. The question presented by Petitioner relates to whether it

is required that a determination of some causal connection be found between the conduct of an alleged conspirator and the harm complained of before the alleged conspirator may actually be deemed to be a co-conspirator. It is undisputed that after an alleged conspirator is determined to be a conspirator, no further causal inquiry is made in order for the conspirator to be liable for the conduct of his co-conspirators.

Petitioners' Opening Brief describes the issue presented as follows:

> "If the alleged conspirator's conduct was not causally related to the injury, then it is compelling that the alleged conspirator was not in fact a conspirator. To hold otherwise, as did the Ninth Circuit, widens the scope of liability to a defendant beyond reason. . . . Such a causal connection should be required as a condition to determining that a particular individual is a co-conspirator, particularly since the law is well settled that once co-conspirator status is established, no further causal connection between the conduct of the co-conspirator and the ultimate loss need be established." (Petitioner's Opening Brief, page 19.)

Because Respondents refuse to recognize the question actually raised by Petitioner, Respondents "arguments" are entirely misplaced. Respondents' first argument is entitled as follows: "There Is No Split In The Circuits On The Issue Of Whether Conspirators Are Liable For The Acts Of The Co-Conspirators" (Opposition Brief, pages 17-18). This argument is beside the point, as Petitioner does not dispute that conspirators are liable for acts of co-conspirators without further inquiry into causation.

Similarly, Respondents' second argument entitled "Petitioner's Attempt To Distance Himself From His Co-Conspirators Does Not Warrant The Court's Review" (Opposition Brief, pp. 18-22) amounts to a quibble over the state of the record below and an attempt by Respondents to reargue the basis for the grant of summary judgment and does not focus on the question presented for review. In effect, Respondents have chosen to argue about, and to attribute to Petitioner, questions other than those presented in this Petition.

CONCLUSION

For the reasons stated in Petitioner's Opening Brief, this Court should issue a Writ of Certiorari to review the Judgment of the Court of Appeals for the Ninth Circuit.

Dated: January 8, 1991

Respectfully submitted,

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